Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No._____

CHARLES MOORMAN, KATHLEEN MOORMAN and YOUR LOCAL FENCE, INC.,

Petitioner,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

THEODORE W. HERZOG, ESQUIRE
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KEY WEST, FLORIDA 33040

Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court correctly determined that land development regulations of one of its counties banning all fences in an Area of Critical County Concern was constitutional under State and Federal due process requirements as being narrowly tailored to achieve legitimate state objectives in protecting Key Deer in light of testimony at Trial by the expert witness of an agency of the State of Florida (Department of Community Affairs) that some fences would be beneficial to Key Deer and in the face of evidence that without fences children's lives were endangered on their own property.

2. Whether the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution require that a County Land Development Regulation banning all fences in an area of critical county

concern within the State of Florida was facially unconstitutional as not bearing a reasonable and substantial relation to the purpose sought to be attained.

3. Whether an open ended moratorium extending for a period of years created by enactment of a Land Development Regulation by a County located within the State of Florida prohibiting fences for an indeterminate period of time is unconstitutional based upon the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS BEFORE THE STATE OF FLORIDA SUPREME COURT

1. Charles Moorman
(Theodore W. Herzog, Attorney)
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Tallahassee, Florida 32301

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TABLE OF AUTHORITIES

Cases

Loretto v. Teleprompter CATV Corp.
458 US 419 (1992) 21, 22

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE

1. A "Recommended Order" (based upon the initial trial of this cause held on February 6, 1992) was issued on April 30, 1992 by William J. Kendrick, Hearing Officer, Division of Administrative Hearings, Tallahassee, Florida which reversed issuance of certain fence permits by Monroe County, Florida.

2. A "Final Order" was issued on July 30, 1992 by Linda Loomis Shelly, Secretary, Department of Community Affairs, Tallahassee, Florida adopted the "Recommended Order" issued by the Administrative Hearing Officer.

3. On July 8, 1992 a Final Order was issued by Douglas M. Cook, Secretary Florida Land and Water Adjudicatory Commission, Tallahassee, Florida which confirmed the "Recommended Order" of the Hearing Officer.

4. A Written Opinion of the District Court of Appeals for the Third District of Florida was issued on November 23, 1993, such Opinion appearing at 626 So. Rep. 2nd 1108 et seq (1993).

5. The Supreme Court of Florida issued its Written Opinion on September 28, 1995 (Department of Community affairs, Petitioner v. Charles Moorman, et al, Respondents, Case No. 82,946, 1995.

6. The District Court of Appeal of Florida for the Third District withdrew its Mandate previously issued in this cause on December 9, 1993 by virtue of its Order dated January 4, 1996.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The Judgment or decree being reviewed is the Opinion of the Supreme Court of Florida rendered on September 28, 1995 in Department of Community Affairs, Petitioner v. Charles Moorman, et al, Respondents, Case No. 82,946. Petitioners herein Moorman and Your Local Fence filed a Motion for rehearing with the Florida Supreme Court on October 12, 1995, which Motion was granted by the Florida Supreme Court on October 24, 1995. After briefing by the parties, the Supreme Court of Florida denied the Motion for Rehearing and Clarification filed by Petitioners herein (Charles Moorman, et al), such denial by Order dated December 20, 1995.

Jurisdiction of this Court is based upon the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and

Supreme Court Rule 10-1(c) providing that the Supreme Court of the United States of America has discretionary jurisdiction when a State Court of last resort (the Supreme Court of the State of Florida herein) has decided a Federal question in a way that conflicts with the applicable decisions of the United States Supreme Court. The applicable constitutional provisions (the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States) are as follows:

United States Constitution

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1.

All persons born or naturalized in the united States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Appeal arises out of an Appeal by the Florida Department of Community Affairs (DCA) of building permits issued to Petitioners Moormans, Your Local Fence and three other property owners, such permits having been applied for and received in the form of fence permits issued by Monroe County, Florida. All of the properties owned by the parties in the area in which Your Local Fence operates its business of constructing fences live within various subdivisions within the Big Pine Key Area of Critical County Concern which is located in Monroe County, Florida.

The Appeals of the building permits in question by the DCA were consolidated into a single Administrative Hearing. At the Administrative Hearing testimony was presented by the DCA principally through a

biologist and an expert in comprehensive planning. The property owners in question and the owner of the business in question testified as to their reasons why they desired to fence their property (in the case of the property owners) and to construct fences (in the case of the fence company) on Big Pine Key, Monroe County, Florida.

Testimony was produced at Trial at the Administrative Hearing level by a property owner indicating the necessity of a fence to prevent their small children from falling into a canal abutting their back yard, such testimony including affirmation that one of their children had in fact fallen into the canal. The subject property owners also provided testimony that a fence would prevent their dog, a rottweiler, from harming the Key Deer. Other property owners testified

that they needed fences to protect their property from trespassers and crime and to prevent the Key Deer from eating their vegetation.

Testimony was elicited from the DCA's biologist expert to the effect that Key Deer are in fact an endangered species. The biologist also testified that fences can be harmful to key deer because they interrupt the normal movements of the animals and exclude habitat but also testified that in some cases fencing might be a good idea to protect Key Deer. The biologist further testified that he did not regard all of the Big Pine Key subdivisions in question as habitat for key deer and that significant areas of real property were included within the habitat area defined by Monroe County's ordinance prohibiting the construction of fences for the protection of Key Deer.

At the conclusion of the Administrative Hearing, the Hearing Officer found that the fence permits in question were contrary to Section 9.5-309 of the Monroe County Land Development Regulations which ban all fences in the subject Area of Critical Concern. The Hearing Officer prepared a recommended order reversing the decision of the Monroe County Building Department to issue the fence permits in question. The recommended order of the Administrative Hearing Officer was then adopted by the Department of Community Affairs and the State of Florida Land and Water Adjudicatory Commission.

At the District Court of Appeal of Florida for the Third District of Florida, Petitioners herein asserted that the blanket prohibition of fences by virtue of the applicable Monroe County Land

Development Regulation was unconstitutional as an invalid exercise of police power, as a violation of due process and also contended that the subject land use regulations restricting development of Big Pine Key infringed on constitutionally protected property rights and interests of landowners.

The Opinion of the District Court of Appeal for the Third District (Charles Moorman and Kathleen Moorman; Your Local Fence and Monroe County, Appellants, v. Department of Community Affairs, Appellee, 626 So 2nd 1108, 1993) held that Section 9.5-309(e) of the Monroe County Land Development Regulations was unconstitutional on its face. The District Court of Appeal's Opinion was based upon its determination that the Florida Constitution (Article I Section 2) provides that "all natural persons are

equal before the law and have inalienable rights, among which are the right to acquire, possess and protect property." Reference was also made to Article I, Section 9 of the Florida Constitution which provides that "no person shall be deprived of life, liberty or property without due process of law". The Third District Court of Appeal also held that the Land Development Regulation in question was unconstitutional as a violation of due process since the means selected by the legislature did not bear reasonable and substantial relation to the purposes sought to be obtained and as passing beyond the bounds of reason and having assumed the character of a merely arbitrary fiat.

It is notable that at the Third District Court of Appeals level the Court emphasized the testimony of the biologist

indicating that some fences would not harm the key deer and would in fact in certain circumstance be beneficial to them. The expert testified that in three out of four cases before the Administrative Hearing Officer there was no biological basis for denying the fence permit. Based upon the foregoing, the Third District Court of Appeals held that the complete ban on all fences in Big Pine Key did not accomplish "either of the two goals of the legislation:

1.) The ban on all fences does not always protect the key deer as some deer can be harmed in places where there are no fences; and

2.) The fence ban does not recognize the individual's right to "protect, enjoy and use one's property."

The Supreme Court of Florida issued its Opinion on September 28, 1995 holding

that the application of the ordinance to the particular fence permit issued to Charles and Kathy Moorman was constitutional as applied because it was applied on a rational basis consistent with state environmental policy. The subject Opinion of the Supreme Court of Florida failed and neglected to address or recognize the rights of Your Local Fence, Inc. as a business operation constructing fences throughout Big Pine Key, Monroe County, Florida (an area where the State of Florida's biologist testified land was included within a prohibited zone (in terms of construction of fences) which was in fact not Key Deer habitat.

The Opinion of the Supreme Court of Florida recognized in its text that a blanket prohibition of fencing as effected by the subject Monroe County Land Development Regulation was meant as an

interim restriction to be replaced within a year by a more comprehensive regulation that would better identify where fence restrictions would be proper and where they were unnecessary. The Court also recognized that despite the interim nature of the subject ordinance it had "been on the books for more than five years before the times in question with respect to the building permits before the Court and had not been modified so as to indicate the termination date on the moratorium created thereby or the standard by which modifications thereto would be made as required by the County Commission of Monroe County, Florida in terms of its mandate to develop a "focal point plan" further analyzing the issue of fencing and protection of Key Deer.

The Florida Supreme Court's opinion defined as the nub of the issue "a simple

failure to revisit an interim" land use regulation that was never intended to be a permanent feature of the County Code Book, as it seem to have become by the times in question."

The right of due process in Petitioners herein was recognized by the Florida Supreme Court under the Florida Constitution which the Court held does in fact guarantee the right to enjoy property and can include decisions regarding the improvement of property. The Court's opinion ultimately held that the Land Development regulations in question did meet constitutional muster in terms of due process in that they "must be upheld unless they bear no substantial relationship to legitimate societal policies." Based upon the foregoing the Court held that the ordinance in question should not have been stricken on its face.

Again, however the Florida Supreme Court neglected to address the question of unconstitutional broad base and of the arbitrary and capricious nature of the subject land development regulation. The Florida Supreme Court's decision to allow the ordinance in question to stand was made in the face of their determination that "the underlying intent was to replace the ordinance with something less restrictive, although this intent regrettably was never carried forward into action."

The decision of the Florida Supreme Court runs directly contrary to the determinations of this Court. This Court has held on numerous occasions that the right to exclude others [from one's real property] is one of the most essential sticks in the bundle of rights that are commonly characterized as property"

(Loretto v. Teleprompter CATV Corp., 458 US 419 1992). This Court has also held in Nollan v. California Coastal Commission, (55 LW 5145, 1987) that a ban on fences could be constitutional in some circumstances but that "the evident constitutional propriety disappears, however, if the conditions substituted for the prohibition utterly fails to further the end advanced as to the justification for the provision." The rational nexus test established by Nollan indicates that a lack of nexus between the condition and the original purpose of a building restriction converts that purpose to something other than what it was. The position of the Florida Supreme Court runs contrary to the holding of this Court in Nollan that the California Coastal Commission could not require the property owner to grant and easement over his

property as a condition for granting a building permit. The total ban on fences over an area of Big Pine Key, Monroe County, Florida which includes significant areas that are not Key Deer habitat constitutes a clear breach of the Nollan logical nexus standards which are based (in significant part) upon the due process clause of the Fifth and Fourteenth Amendment to the United States Constitution. While it is a legitimate goal to attempt to protect the Key Deer as an endangered species that goal should be shouldered equally be all citizens of the State of Florida and not by an arbitrary moratorium imposed upon selected landowners without appropriate standards.

Due process questions were raised throughout the proceedings referred to in this Petition for Certiorari being first initiated at the Administrative Hearing

level and continuing on through the Florida Supreme Court level. The Florida Constitution due process issues were dealt with by the District Court of Appeal of Florida for the Third District which held that the land development regulation in question was unconstitutional. The Florida Supreme Court ruled on due process issues and determined that the Land Development Regulation in question was not unconstitutional on its face and was constitutional as applied to the Moormans as individuals (neglecting to address Your Local Fence, Inc. as a fence construction company).

SUBSTANTIAL ISSUES PRESENTED

The questions presented herein are of such impact as to hold in the balance of their determination the economic viability of Petitioner Your Local Fence, Inc.'s business since the Monroe County Land Development Regulation in question constitutes a total ban on construction within a specified geographic zone on the basis of an open ended moratorium in terms of time or standards of development. Further, the Land Development Regulation in question constitutes an arbitrary and capricious legislative act which violates the due process rights of Petitioners as presented under the facts of this case. The questions presented are, therefore, so substantial as to require consideration with briefs on the merits and oral argument before their resolution. Wherefore Petitioner requests that this

Court issue its Writ of Certiorari accepting jurisdiction of this matter for review.

Respectfully submitted,

THEODORE W. HERZOG, ESQUIRE
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(305)-293-9655
(Admitted to the Bar of the Supreme Court of the United States of America on August 12, 1977.)

CERTIFICATE OF SERVICE

I, Theodore W. Herzog, Esquire, a member of the Bar of the Supreme Court of the United States of America, do hereby certify that on this the 16th day of June, 1996 three copies of Petitioner's Petition for Writ of Certiorari were served upon the following persons:

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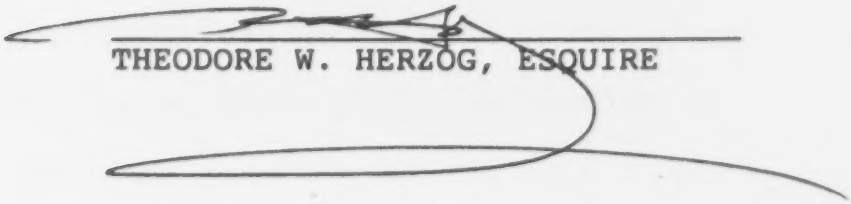

THEODORE W. HERZOG, ESQUIRE

APPENDIX

APPENDIX "A"

STATE OF FLORIDA
LAND AND WATER ADJUDICATORY COMMISSION

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

vs.

FLWAC CASE NO. APP-91-017
DOAH CASE NO. 91-4110DRI

CHARLES MOORMAN and KATHLEEN MOORMAN, Owners; YOUR LOCAL FENCE, Contractor; and MONROE COUNTY,

Respondent.
_____/

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

vs.

FLWAC CASE NO. APP-91-029
DOAH CASE NO. 91-5966DRI

RAYMOND MCRAE and ROSEMARIE MCRAE, Owners; and MONROE COUNTY,

Respondent.
_____/

DEPARTMENT OF
COMMUNITY
AFFAIRS,

Petitioner,

vs. FLWAC CASE NO. APP-91-021
DOAH CASE NO. 91-5968DRI

NICHOLAS HORNBACHER
and JEAN HORNBACHER,
Owners; YOUR LOCAL
FENCE; Contractor; and
MONROE COUNTY,

Respondent.
_____/

DEPARTMENT OF
COMMUNITY
AFFAIRS,

Petitioner,

vs. FLWAC CASE NO. APP-91-040
DOAH CASE NO. 91-6603DRI

JAMES DANIELS and
KATHRYN DANIELS,
Owners; YOUR LOCAL
FENCE; Contractor; and
MONROE COUNTY,

Respondent.
_____/

FINAL ORDER

This matter came before the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission ('Commission") on July 8, 1992, in Tallahassee, Florida, pursuant to section 380.07, Florida Statutes (F.S.) for consideration of a Recommended Order issued by the Division of Administrative Hearings (DOAH) in the above referenced proceeding. Based upon a review of the record in this matter, the Commission voted to adopt the Findings of Fact and Conclusions of Law set forth in the Recommended Order dated April 30, 1992, and issue this Final Order adopting the Hearing Officer's Recommended Order. It is hereby ordered that the following building permits issued by Monroe County be rescinded: Building Permit No. 9110002231 issued to Charles and Kathleen Moorman and Your Local Fence; Building Permit No. 9110002807 issued to Nicholas and Jean Hornbacher and Your Local Fence;

Building Permit No. 9110002853 issued to Raymond and Rosemarie McRae; and Building Permit No. 9110003165 issued to James and Kathryn Daniels and Your Local Fence. The DOAH Recommended Order is incorporated into this Final Order as Exhibit A.

Ruling on Respondent, Jean Hornbacher's Exceptions

1. DENIED. The record supports the hearing officer's Finding of Fact 12 regarding the construction of fences on Big Pine Key in that Big Pine Key is the primary habitat of the Key Deer, an endangered species, and section 9.5-479(d)(1), Monroe County Code (MCC), states that "no development shall be carried out in the Big Pine Key Area of Critical County Concern (ACCC) except for single-family detached dwellings on lots in the Improved Subdivision District". Moreover, section 9.5-309, MCC, states that "no fences shall be erected until such time as this chapter is created to provide for the regulation of fences within this ACCC". In Finding of

Fact 14, the hearing officer also stated that "over the course of the past five years, Monroe County has discussed design criteria for fences on Big Pine Key but has not yet adopted a regulation that would provide for fences within the Big Pine Key ACCC as mandated by Section 9.5-309, MCC".

2. DENIED. The records reflects on page 137 of the Final Hearing Transcript that although Mr. Pete Kalla, expert witness in biology, stated "I don't regard subdivisions as habitat, per se, because I don't believe it's a natural situation for Key Deer to be in subdivisions", he went on to say on page 141 of the Final hearing Transcript that "fences are harmful to the Key Deer in that they do two things: 1) they interrupt the normal movements of the animal; and 2) they exclude habitat from the animal." Mr. Kalla further stated that "Key Deer move essentially constantly and they take up a large area and to have fences in that area and affect their movements is deleterious to them."

3. DENIED. In the hearing officer's Finding of Fact 22 of the Recommended Order with regard to the propriety of fences on Big Pine Key, the hearing officer found, and the Commission agrees, that although the Department of Community Affairs ("Department") may have failed to appeal every fence permit issued in the Big Pine Key ACCC, as alleged by Mr. Moorman, Respondent his argument that as a consequence of their failure, the Department should be precluded from contesting the issuance of the subject permits, is not persuasive. It was further stated by the hearing officer in of Fact 23 of the Recommended Order that "neither the applicants nor Your Local Fence made any inquiry of the Department as to why some permits were appealed and others were not, or requested that the Department waive its appeal period, prior to erecting their fences. Under such circumstances, it cannot be reasonably concluded that the Department misled any applicant so as to bar it from

contesting the propriety of the subject fences, and those who chose to erect their fences knowing their permits were not yet effective acted at their peril."

WHEREFORE, this Commission hereby adopts the Recommended Order including the Findings of Fact and Conclusions of Law set forth in the Recommended Order, and hereby enters this Final Order reversing Monroe County's decision to issue the subject permits and deny the applications of the Moormans, Hornbachers, McRae's, and Daniels, as owners, as well as Your Local Fence, as contractor, for such permits. It is further ordered that there are no changes in the subject proposals that would make them eligible to receive the permits as requested since the Monroe County Code prohibits fences on Big Pine Key.

Any party to this order has the right to seek judicial review of the order pursuant to section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule

9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Planning and Budgeting, Executive Office of the Governor, Room 413 Carlton Building, 501 South Gadsden Street, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied with the applicable filing fees, with the appropriate District court of Appeal. n Notice of Appeal must be filed with the Clerk of the Commission.

DONE AND ENTERED this 8th day of July 1992.

DOUGLAS M. COOK, Secretary
Florida Land and Water
Adjudicatory Commission

FILED with the Clerk of the Florida Land and Water Adjudicatory Commission this the 8th day of July 1992.

PATRICIA P. MCCRAY
Clerk, Florida Land and Water
Adjudicatory Commission\

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by U.S. Mail this 8th day of July 1992.

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Florida Land and Water
Adjudicatory Commission

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APPENDIX "B"

Charles MOORMAN and Kathleen Moorman; Your Local Fence, and Monroe County, Appellants,

v.

DEPARTMENT OF COMMUNITY AFFAIRS, Appellee.

No. 92-1785

District Court of Appeal of Florida, Third District.

Nov. 23, 1993

Before SCHWARTZ, C.J., and BASKIN and GERSTEN, J.J.

GERSTEN, Judge.

The appellants Charles Moorman and Kathleen moorman (Moorman), and Your Local Fence (Contractor), appeal a final order of the Florida Land and Water Adjudicatory Commission (Commission), rescinding Monroe County fence permits. We reverse.

Moorman and three other property owners[1] applied for, and received, Monroe County fence permits. The owners'

properties are located in various subdivisions within the Big Pine Key area of Critical County Concern (Area of Critical Concern). Only one property is situated in the natural habitat for Key Deer while the other three properties are not.

Appellee, The Florida Department of Community Affairs (DCA), appealed each permit contending: 1) that the permits were inconsistent with section 9.5-309(e) of the Monroe County Land Development Regulations (MCLDR), because this section bans all fences on Big Pine Key; and 2) that there were no exceptions to this section providing for fences.

The appealed permits were consolidated into a single administrative hearing. At the hearing, the DCA presented testimony of a biologist and an

expert in comprehensive planning. Each property owner testified why they desired to fence their property.

One property owner testified that their fence was needed to prevent their three small children from falling into the canal that abuts their backyard. Previously, one child fell into the canal. Additionally, a fence would prevent their dog, a rottweiler, from harming the Key Deer. The other property owners needed fences to protect their property from trespassers and crime, and the prevent the Key Deer from eating their vegetation.

Significant testimony came from the biologist. He explained that Key Deer are endangered species whose long term viability is threatened by habitat loss. In his opinion, generally, fences are harmful to Key Deer because they interrupt

the normal movements of the animals and exclude habitat. However, he also stated that in some cases fencing might be a good idea.

The biologist did not regard all Big Pine Key subdivisions as habitat for Key Deer. He determined that the Daniels, Hornbacher, and McRae subdivisions were not Key Deer habitat. In his opinion, there was no biological basis for objecting to fences in these areas. However, a fence on the Moorman property would be harmful to Key Deer because it would fence some Key Deer habitat.

The hearing officer found that the fence permits are contrary to section 9.5-309, MCLDR, which bans all fences in the Area of Critical Concern. The hearing officer recommended a final order reversing Monroe County's decision to

issue the various permits. Subsequently, the Commission entered a final order adopting the hearing officer's recommended order and rescinded all four Monroe County fence permits.

Appellants assert that the blanket prohibition on fences contained in section 9.5-309(e), MCLDR, is unconstitutional as an invalid exercise of police power. Appellee contends that the fence prohibition is constitutional because it rationally relates to the protection of Key Deer as a species.

The resolution of this issue requires us to seek a harmonious balance between the constitutional right to protect and develop one's property and the right of the Key Deer to exist unfettered. In deciding this issue, we must review the statutory and regulatory framework.

Section 380.0552, Florida Statutes (1991), designates the Florida Keys as area of critical state concern. The statute's intent was to establish, inter alia, "a land use management system that protects the natural environment of the Florida Keys" and protects "the constitutional rights of property owners to own, use, and dispose of their real property." §380.0552(2)(f), Fla.Stat. (1991).

Similarly, Monroe County designated most of Big Pine Key, "An Area of Critical County Concern" in the MCLDR. Section 9.5-479(b) provides:

> (b) Purpose: The purpose of the Big Pine Key Area of Critical County Concern is to establish a focal point planning effort directed as reconciling the conflict between

reasonable investment backed expectations and the habitat needs of the Florida Key Deer which is listed as endangered under the Federal Endangered Species Act.

In 1986, section 9.5-479(c)(3), MCLDR, provided that Monroe County would have twelve months to complete the focal point plan for Big Pine Key. One of the purposes of the focal point plan was to provide criteria for permitting fences in designated areas within the Area of Critical Concern. After more than five years, Monroe County failed to complete a focal point plan.

Consequently, section 9.5309(e), MCLDR, remained the only regulation governing fences in the Area of Critical Concern. This section provides:

It is the purpose of this section to

regulate fences and freestanding walls in order to protect the public health, safety and welfare.

* * * * * * * *

(e) Big Pine Key Area of Critical County Concern: No fences shall be erected here until such time as this chapter is created to provide for the regulation of fences within this Area of Critical County Concern.

Given this scenario, we address the constitutionality of section 9.5-309(e).

[1,2] Statutes relating to environmental land and water management require a balancing of the state's interest in protecting the public's health, safety, and welfare against the constitutionally protected private property interests of the landowner. Graham v. Estuary Properties, Inc. 399

So.2nd 1374, 1377 (Fla.), cert. denied, 454 U.S. 1083, 102 S.Ct. 640, 70 L.ed.2d 618 (1981). The "exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied." Id. at 1379.

[3] In addition, due process also requires that "the means selected by the legislature bear a reasonable and substantial relation to the purpose sought to be attained." In re Forfeiture of 1969 Piper Navajo, 592 So.2d 233, 235 (Fla. 1992); Art. I § 9. Fla.Const.

"Reasonable restrictions upon the use of the property in the interest of the public health, welfare, morals, and safety are valid exercises of the state's police power." Sarasota County v. Barg, 302 So.2d 737, 741 (Fla. 1974). However,

"when a particular attempted exercise of the police power by a state, or under its authority, passes the bounds of reason and assumes the character of a merely arbitrary fiat, it will be stricken down and declared void." Caroll v. State, 361 So.2d 144 (Fla, 1978).

"Every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the court to adopt that construction and sustain the act." Id. (quoting Holley v. Adams, 238 So.2d 401, 404 (Fla, 1970).

[4] We recognize that the state's interest in protecting endangered species is a legitimate governmental interest. See Moviematie Indus. Corp. v. Board of County Comm'rs, 349 So.2d 667 (Fla. 3d DCA 1977) (preserving the ecological balance

of a particular area is valid exercise of police power). However, we must decide whether the means chosen by the legislature (the absolute ban against fences on Big Pine Key in section 9.5-309, MCLDR), is narrowly tailored to achieve the state's objective of protecting the Key Deer through the least restrictive alternative. See In re Forfeiture of 1969 Piper Navajo, 592 So.2d at 235.

[5] the DCA's expert testimony established the impropriety of a blanket prohibition on fences. The biologist testified that some fences would not harm the Key Deer. In fact, some fencing would be beneficial to them. The same expert testified that in three out of the four cases requesting a permit, there was no biological basis for denying the fences.

Thus, the complete ban on all fences

in Big Pine Key does not accomplish either of the two goals of the legislation: 1) the ban on all fences does not always protect the Key Deer as some deer can be harmed in places where there as no fences; and 2) the fence ban does not recognize the individual's right to protect, enjoy and use one's property. Therefore, the fence regulation clashes with Florida's constitution.

Although we recognize one of the cardinal rules in reviewing the constitutionality of a statute is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," Brockett v. Spokane Arcades, Inc. 472 U.S. 491, 501, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985) (quoting United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4

L.Ed.2d 524 (1960), based upon the record before us, there was simply no showing that the statute was unconstitutional as applied.

Accordingly, we hold section 9.5-309(e), MCLDR, is facially unconstitutional because the method chosen by the legislature is not narrowly tailored to achieve the state's objective of protecting the Key Deer. See In re Forfeiture of 1969 Piper Navajo, 592 So.2d at 235. This is particularly so because property rights are protected by numerous provisions in the Florida Constitution.

Article I, section 2 provides that "all natural persons are equal before the law and have inalienable rights, among which are the right... to acquire, possess and protect property..." Article I, section 9 provides that "no person shall

be deprived of life, liberty or property without due process of law..." Article I, section 23 provides that "every natural person has the right to be let alone and free from governmental intrusion into his private life..."

"These property rights are woven into the fabric of Florida history." Shriners Hospitals for Crippled Children v. Zrillie, 563 So.2d 64, 67 (Fla.1990). So long as the public welfare is protected, every person in Florida enjoys the right to possess property free from unreasonable government interference. Id.

We are aware of the need to protect and preserve endangered species. However, the "ecology and environment must to some extent yield to the needs and wants of the human factor in our scheme of life and happiness," Jacksonville Elec. Auth. v.

Pollution Control Bd., 270 So.2d 759, 761 (Fla. 1st DCA 1972). Here, there was evidence that children's lives were in danger on their own property because of the ban on fences. We must be careful not to escalate the goal of preservation of an animal species over human life.

Accordingly, we reserve the order entered below because section 9.5-309(e), MCLDR is unconstitutional.

BASKIN and GERSTEN, J.J., concur

BASKIN, Judge (concurring).

The partial dissent concludes that the "section in question is invalid as it applies to the appellants' particular fence." Op. at 1111. That conclusion ignores the fact that appellants' home is within key deer habitat and is properly subject to fencing regulations for environmental protection purposes. Thus,

the majority holds that the record does not support a finding that the statute is unconstitutional as applied. Op. at 1111. The statute is unconstitutional where, as here, the restriction constitutes unreasonable government interference in appellants' constitutionally protected property rights. See Shriners Hosps. for Crippled Children v. Zrillie, 563 So.2d 64, 68 (Fla.1990); Art. 1, §2, Fla. Const. For these reasons, I concur in the majority opinion.

SCHWARTZ, Chief Judge (specially concurring in part, dissenting in part).

I concur in the result and in the opinion only to the extent that it determines that the section in question is invalid as it applies to the appellants' particular fence. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct.

2794, 86, L.Ed.2d 394 (1985); Fardig v. Municipality of Anchorage, 803 P.2d 879 (Alaska Ct.App.1990); Palm Beach Mobile Home, Inc. v. Strong, 300 So.2d 881 (Fla,1974); Monroe County v. Gonzalez, 593 So.2d 1143 (Fla. 3d DCA 1992). It is neither necessary nor appropriate to strike down the entire regulation which may well be- indeed apparently is-- otherwise an appropriate and valid exercise of the state's police power authority to protect our environment and wildlife. See Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1381 (Fla.1981), cert. denied, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981(; Sarasota County v. Barg, 302 So.2d 737, 741 (Fla.1974); State ex rel. Wilcox v. T.O.L., Inc., 206 So.2d 69, 71-27 (Fla. 4th DCA 1968).

APPENDIX "C"

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Third District

WHEREAS, in that certain cause filed in this Court styled:

DEPARTMENT OF COMMUNITY AFFAIRS v. CHARLES MOORMAN, et al.

Case No.: 82,946
Your Case No.: 92-1785

The attached opinion was rendered on: September 28, 1995

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Stephen H. Grimes, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 20th day of December, 1995

_____

Clerk of the Supreme Court of Florida

SUPREME COURT OF FLORIDA

No. 82,946

DEPARTMENT OF
COMMUNITY AFFAIRS,

Petitioner,

vs.

CHARLES MOORMAN, et al.,

Respondents.

(September 28, 1995)

KOGAN, J.

We have for review Moorman V. Department of Community Affairs, 626 So. 2d 1108 (Fla. 3d DCA 1993), because of express and direct conflict with Harrell's Candy Kitchen Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla.1959), among other decisions. We have jurisdiction. Art. v, § 3 (b) (3), Fla. Const.

APPENDIX "D"

SUPREME COURT OF FLORIDA

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner/Appellant,

vs. CASE NO. 82,946

CHARLES MOORMAN,
KATHLEEN MOORMAN,
and YOUR LOCAL FENCE,

Respondents/Appellees.
_____/

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL
THIRD DISTRICT
Case No. 92-1785

RESPONDENTS'/APPELLEES' MOTION FOR REHEARING; CLARIFICATION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.330

THEODORE W. HERZOG
Florida Bar Number 151456
Attorney for Respondents/Appellees
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I. This Court's Opinion of September 28, 1995 misapprehends and/or overlooks the due process and equal protection violations of application of the Monroe County Fence Ordinance to Appellees based upon Trial testimony controverting the State's expert testimony which was relied upon by this Court in its Opinion and the lack of adoption of a Focal Point Plan by Monroe County as required by County ordinance.

TABLE OF AUTHORITIES

Cases:
Page(s)

Moorman v. Department of Community Affairs
626 So.2nd (Fla. 3d DCA 1993) . 1, 3, 7, 8, 10, 11

Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority
111 So. 2nd 439 (Fla. 1959) 2

STATEMENT OF THE CASE

This case was argued before the Florida Supreme Court on October 5, 1994 after the submission of briefs by the parties. This Court rendered its Opinion on September 28, 1995. Respondents/Appellees appear now to file their Motion for Re-Hearing/Clarification Pursuant to Florida Rules of Appellate Procedure 9.330.

RESPONDENTS'/APPELLEES' MOTION FOR REHEARING; CLARIFICATION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.330

COMES NOW, Respondents/Appellees pursuant to Florida Rule of Appellate Procedure 9.330 and file this their Motion for Rehearing; Clarification based upon the argument set forth at pages 2 through 6 hereof.

Respondents/Appellees pray that this Court enter its order allowing for re-hearing of this cause and clarification modifying the Opinion filed herein on September 28, 1995 so as to declare and establish application of the Monroe County Fence Ordinance to Charles and Kathleen Moorman as unconstitutional as applied or, alternatively, to order further procedings below concerning the application of the Monroe County fence ordinance to

Respondents/ Appellees.

ARGUMENT

I. THIS COURT'S OPINION OF SEPTEMBER 28, 1995 MISAPPREHENDS AND/OR OVERLOOKS THE DUE PROCESS AND EQUAL PROTECTION VIOLATIONS OF APPLICATION OF THE MONROE COUNTY FENCE ORDINANCE TO APPELLEES BASED UPON TRIAL TESTIMONY CONTROVERTING THE STATE'S EXPERT TESTIMONY WHICH WAS RELIED UPON BY THIS COURT IN ITS OPINION AND THE LACK OF ADOPTION OF A FOCAL POINT PLAN BY MONROE COUNTY AS REQUIRED BY COUNTY ORDINANCE.

In its Opinion of September 28, 1995 in this cause, this Court held that the Opinion entered by the Third District Court of Appeals in Department of Community Affairs v. Moorman, 626 So. 2nd 1108 (Fla. 3D DCA 1993) is in express and direct conflict with Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport

Authority, 111 So. 2nd 439 (Fla. 1959), among other decisions.

The Harrell case clearly holds that there is no question concerning the power of the Legislature to authorize agencies of the government to adopt and enforce zoning regulations. The Harrell case also establishes that duly enacted zoning ordinances are presumptively valid with the burden being upon the party attacking such ordinances to establish and prove that the subject regulation is unreasonable and bears no substantial relation to the public health, safety, morals or general welfare. Respondents/Appellees do not controvert the rule(s) of law established by the Harrell case but assert that they are misapplied by this Court in the instant case as being a basis for allowing the

Monroe County fence ordinance in question to stand as validly applying to Respondents/Appellees.

As this Court acknowledges at page 2 of its Opinion rendered herein on September 28, 1995, the ordinance in question had been on the Monroe County books for more than five years before this matter was tried. The trial transcript below indicates at page 116 that a Focal Point Plan for the Big Pine Key area of critical county concern has not been submitted to the department of Community Affairs for approval or adopted by Monroe County. It is uncontroverted that the interim ordinance banning fences on Big Pine Key was enacted in 1986 subject to a county ordinance requirement that a Focal point Plan be adopted within twelve months of that date. As of the time of argument

of this case before this Court, and at the present time, a Focal Point Plan has not been adopted so that the twelve month time period within which to adopt a Focal Point Plan has been exceeded by eight years.

Further, the State's expert at Trial, Dr. Peter Kalla, testified that the ordinance in question covers substantial areas of Big Pine Key, Florida (i.e.: subdivisions located thereon) which are not natural key deer habitat (transcript at pages 137 and 138). Dr. Kalla also testified that he (and others) have reasoned that in some cases fencing might be a good idea. Dr. Kalla's testimony was that such reasoning was the basis of the establishment of an <u>interim fence ordinance</u> for Big Pine Key (transcript at page 142). The foregoing circumstance and opinion ultimately yielded Dr. Kalla's

testimony that there were "good fences and bad fences" as is noted in this Court's Opinion of September 28, 1995. Most notably, Dr. Kalla testified that it is accurate to say that the ordinance excluding fences on Big Pine Key extends beyond specific recommendations made by him based upon his expertise as explained at Trial (transcript at page 149).

Notwithstanding the foregoing, this Court's Opinion entered in this cause indicates at page 8 thereof that the Moormans' fence is harmful to key deer habitat based upon "uncontroverted" expert evidence. Respondents/Appellees suggest that Dr. Kalla's own testimony and expert opinion calls for and recommends an analysis of habitat and specific fencing considerations as a pre-requisite for a final and consistent determination with

respect to the establishment of a proper ordinance. The simple fact that Dr. Kalla testified as to the question as to whether fences are "good or bad" as being the basis for the establishment of an interim ordinance followed by a specific Focal Point Plan, establishes that the interim ordinance is a patchwork approximation (at best) requiring further consideration. That fact coupled with the circumstance that the interim ordinance has now been in place for nine years argues in and of itself for the proposition that the application of the Monroe County fence ordinance to the residential fence owned by the Moormans as individuals requires further consideration consistent with this Court's Opinion before it can be determined to be harmful to key deed habitat on a factual basis.

Further, the existence of the interim ordinance for a period eight years in excess of the twelve month allotted time for the adoption of a Focal Point Plan establishes facial unconstitutionality of the Monroe County fence ordinance in question.

This Court's statement in its Opinion that the evidence of Dr. Kalla was uncontroverted is inaccurate. This Appeal is based upon several fence permit applications beyond those relating to the Moorman residential fence alone. Respondents/Appellees in this cause are Kathleen Moorman, Charles Moorman and Your Local Fence. Your Local Fence's Appeal herein relates to the issuance of several permits beyond the fence permit applying to the Moorman residence (i.e.: to Daniels and Hornbacher). At Trial James

Daniels and Kathryne Daniels (whose permit was secured by Your Local Fence and is therefore subject to this appeal) testified that the application of the fence permit to their lot (secured through Your Local Fence as contractor) was not harmful to key deer habitat in that it provided for safety and protection of their children from falling into a canal adjacent to their property and provided the function of fencing in their rottweiler dog for the protection of key deer (transcript at pages 59 through 64). Testimony was also presented at Trial by Jean and Nicholas Hornbacher (whose permit was also obtained by Your Local Fence) to the effect that fences provided protection from destruction of their private property in the form of browsing damage to landscaping by key deer. The testimony

provided by the foregoing witnesses, when coupled with the testimony of Dr. Kalla to the effect that an interim ordinance was to be replaced by a Focal Point Plan considering a balancing of private property interests, necessarily mandates a further trial Court evidentiary hearing.

Dr. Kalla's opinion relative to the Moorman fence specifically as relied upon by this Court is inappropriate when considered in light of his other testimony as pointed out above and the testimony of other witnesses at Trial. Further hearing at the trial level is necessary in order to determine whether or not the ordinance in question is constitutional as applied to the Moorman's individual fence in the event that this Court does not view the ordinance in question as facially unconstitutional.

Respondents/Appellees respectfully submit that this Court has unnecessarily extended itself to make a specific factual determination as to the Moorman's residential fence in a circumstance which requires additional findings of fact at the trial level in the event that the ordinance in question is not facially unconstitutional.

CONCLUSION

This Court should enter its Order granting a rehearing of this cause or further clarify its Opinion of September 28, 1995 either declaring the Monroe County ordinance in question as facially unconstitutional or mandating that the Trial Court below make additional findings of fact and factual determinations before the fence permit issued to Kathleen and Charles Moorman is determined to be harmful to key deer habitat.

Respectfully submitted,

THEODORE W. HERZOG
Florida Bar Number 151456
Attorney for Appellants
209 Duval Street
Key West, Florida 33040
(305) 293-9655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the parties listed below on this the 12th day of October, 1995 by Facsimile Telephone Transmission and United States Mail.

THEODORE W. HERZOG

David J. Russ, Esquire
Assistant General Counsel
Brigette A. Folkes
Assistant General Counsel
ATTORNEYS FOR APPELLANT
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Richard Grosso
1000 Friends of Florida
926 East Park Avenue
Tallahassee, Florida 32301

APPENDIX "E"

SUPREME COURT OF FLORIDA
WEDNESDAY, DECEMBER 20, 1995

DEPARTMENT OF
COMMUNITY AFFAIRS,
Petitioner,

vs.

CASE NO. 82,946
District Court of Appeal,
3rd District - No. 92-1785

CHARLES MOORMAN,
KATHLEEN MOORMAN,
and YOUR LOCAL FENCE,
Respondents.
_____/

Respondents' Motion for Rehearing and Clarification filed in the above cause is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Louis J. Spallone, Clerk

Ms. Brigette Ffolkes
Mr. David J. Russ
Mr. Thomas Herzog
Mr. Richard Grosso

APPENDIX "F"

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

JANUARY 4, 1996

CHARLES MOORMAN,
et al.
Appellants,

vs.

CASE NO. 92-1785
DOAH CASE NO. 91-4110DRI

DEPARTMENT OF
COMMUNITY
AFFAIRS,
Appellee.

FLWAC CASE NO. APP-91-017

_____/

WHEREAS, the opinion rendered by this Court on November 23, 1993 (626 So. 2nd 1108) reversed the order of the Florida Land and Water Adjudicatory Commission, in the above styled cause; and

WHEREAS, on review of this Court's opinion by Petition for Review, the Supreme Court of Florida, by its opinion filed September 28, 1995,a nd its mandate now lodged in this Court, quashed this Court's opinion;

NOW THEREFORE, this Court withdraws its mandate issued in this cause on December 9, 1993, vacates its opinion filed in the cause on November 23, 1993, and adopts, as its own, the opinion of the Supreme Court of Florida, and remands for further proceedings in accordance with the opinion of the Supreme Court. Costs allowed shall be taxed pursuant to Florida Rule of Appellate Procedure 9.400(a).

SCHWARTZ, C.J., and BASKIN and GERSTEN, JJ. concur.

A True Copy

ATTEST

LOUIS J. SPALLONE

Clerk District Court of
Appeal Third District

By /S/_____
Chief Deputy Clerk

cc: Theodore W. Herzog
David J. Russ and Brigette A. Ffolkes
Florida Land and Water Adjudicatory Commission

/mcb

This case involves the validity of a land-use ordinance enacted to protect an endangered species, the miniature Florida Key deer. The regulation affects Big Pine Key where the deer now are largely concentrated. Human development on the Key has put the deer perilously close to extinction, and their numbers are estimated to be only 350 to 4300 animals. The minimum number needed to sustain a viable species is considered 100 to 250 animals. The animals are further endangered by human attempts to feed them, by pet dogs that may kill them, and by automobiles.

The ordinance in question prohibits the erection of fencing in portions of Big Pine Key, where the respondents own property. It was enacted because, in a natural environment, Key deer must roam freely over slash pinelands and wetlands in search of food and water. This necessarily means the deer also must roam over some privately owned lands. The blanket prohibition on fencing was meant as an

interim restriction to be replaced within a year by a more comprehensive regulation that would better identify where fence restrictions would be proper and where they were unnecessary. Despite its interim nature, the ordinance had been on the books for more than five years before the times in question here.

Charles Moorman owns a lot located in the slash pinelands of Big Pine Key. He also is owner of Your Local Fence, a company that is a respondent in this review. Moorman filed for a permit to build a six-foot-high 400-foot-long fence, which Monroe County granted. This was done notwithstanding the "interim" county ordinance. The record contains evidence that Moorman's fence is in a location that will adversely affect the Key deer.

The Department of Community Affairs ("DOCA") appealed the County's decision pursuant to DOCA's authority over areas of critical state concern. § 380.07 (2), Fla. Stat.

(1993). The Moorman lot sits in an area designated as a "critical state concern" in 1979.[1] § 380.0552, Fla. Stat. (1993).

The case was referred to a Division of Administrative Hearings ("DOAH") officer, who found the permits improper. The finding specifically noted that the permits were issued as a matter of right. The officer recommended that the Cabinet, sitting as the Florida Land & Water Adjudicatory Commission ("Commission"), rescind the permits, and the Cabinet agreed. The Moormans then appealed to the Third District, which ruled the anti-fencing regulation facially unconstitutional.

The nub of the issue here is simple failure to revisit an "interim" land-use regulation that was never intended to be a permanent feature of the county code book, as it seemed to have become by the times in question. While Monroe County chose not to apply the ordinance to respondents, DOCA now

[1]The fact the land in question sits in an area of critical state concern is crucial to the result in this case, because it identifies an environmental concern unique to Big Pine Key.

has taken the position that the ordinance must be enforced according to its strict letter. DOCA likewise contends that sufficient justification exists for such a blanket prohibition on fencing in the affected area.

We do not dispute that the State has a legitimate interest in protecting the natural habitat of the Keys and most especially of the Key deer. To this end, the State does in fact have a right to use its police power to establish land-use regulations addressing environmental concerns. Graham v. Estuary Properties, 399 So. 2d 1374 L. Ed. 2d 618 (1981). The clear policy underlying Florida environmental regulation is that our society is to be the steward of the natural world, not its unreasoning overlord. As the Constitution itself states:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for abatement of air and water pollution and of excessive and unnecessary noise.

Art. II, § 7, Fla. Const. There is an obvious public interest in

such a policy, given the fact that environmental degradation threatens not merely aesthetic concerns vital to the State's economy but also the health, welfare, and safety of substantial numbers of Floridians. Sarasota v. Barg, 302 So. 2d 737 (Fla. 1974).

The right of equal protection embodied in article I, section 2 stands for many things, but it does not restrict the State's ability to establish or mandate reasonable environmental regulations, even those that may apply only in a certain area, where the State is addressing an environmental problem peculiar to the area. Even if equal protection is implicated here, the State would only need a rational basis for the zoning restriction. Here, the State has identified a sufficient interest in this instance to justify the classification in question. The interest is plainly stated in article II, section 7 of the Constitution and is only underscored by the unique problem of the Key deer.

The right of privacy set forth in article I, section 23 also does not apply here for a self-evident reason: The decision to use land in a manner contrary to lawful public environmental policy is simply not a private act. Art. I, § 23, Fla. Const. Landowners do not have an untrammeled right to use their property regardless of the legitimate environmental interests of the State.

The right of due process contained in article I, section 9 poses a somewhat different problem, because it does in fact guarantee the right to enjoy property. Within limits, that right can include decisions regarding the improvement of property. Nevertheless, this personal right does not necessarily supervene the rational concerns of public environmental policy. Due process, in other words, seeks to find a balance between public and private interests, not to make the landowner lord over the State, nor the State lord over the landowner.

The State is given wide range in exercising its lawful powers to regulate land use for environmental reasons, and any such land-use regulations thus are valid if supported by a rational basis consistent with overall policies of the State. See Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993). Landowners simultaneously are protected by yet another feature of the law: Any resulting erosion of property value beyond reasonable limits is recompensable by means of inverse condemnation. Art. X, § 6, Fla. Const.; art. I, § 9, Fla. Const. In sum, the rights of property owners are limited by the lawful environmental policies of the State, and the State acting within its lawful power to regulate property is likewise limited by the depth of its purse. Id.

However, we have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relationship to legitimate societal policies. E.g., Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111

So. 2d 439 (Fla. 1959). Here, the record contains competent substantial evidence that the unregulated erection of fencing in the affected area is contrary to Florida's overall policy of environmental stewardship. In this sense, we agree with the argument of DOCA and disagree with the district court below. Because the ordinance promotes a valid public policy, it should not have been stricken on its face.[2]

Nevertheless, we are constrained to determine whether any valid basis existed for denying the Moormans a permit. We of course recognize that the enactment in question today was intended merely as an "interim" rule. This fact in turn means the blanket prohibition against fencing was never regarded as an essential feature of public policy. Rather, the underlying intent was to replace the ordinance

[2] We do note that the Cabinet sitting as the Florida Land & Water Adjudicatory Commission may rescind land-use permits in the Florida Keys or "may attach conditions and restrictions to its decisions." § 380.07, Fla. Stat. (1993). The record is unclear why the Cabinet did not exercise this last grant of authority here.

with something less restrictive, although this intent regrettably was never carried forward into action.

In this vein, DOCA's own expert witness testified in the following terms at the DOAH hearing below:

> Q. All right. Now, sir, the statements that you've made today, and just now, and also one more, you gave indication that there were good fences and bad fences, that's within the standard you're now planning, is that true?
>
> A. Yes.
>
> Q. Because I want to characterize that accurately. But again, now, the opinions that you are expressing now are not necessarily the basis of the ordinance which is in place, isn't that true? Since it precludes fences?
>
> A. Yes, you're right. I had nothing to do with that ordinance. So, I can't comment on it.
>
> Q. Certainly, and that's the only point I'm trying to make here. But it is accurate to say that the ordinance excluding fences, or precluding the, extends beyond what your specific recommendations are based on your expertise as you've explained today?
>
> A. That's correct.

However, the uncontroverted expert evidence clearly

indicated that the Moormans' fence--the only one at issue here today--was harmful to Key deer habitat.

Based on the foregoing, we find that the application of the ordinance to this particular fence permit was constitutional because it was based on a rational basis consistent with state environmental policy. For this reason, the decision below is quashed and this cause is remanded for proceedings consistent with our views here.

It is so ordered.

OVERTON, SHAW, HARDING and ANSTEAD, JJ., concur. GRIMES, C.J., concurs in part and dissents in part with an opinion, in which WELLS, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

GRIMES, C.J., concurring in part and dissenting in part.

I agree that the ordinance is constitutional on its face. I cannot agree that it was necessarily constitutional as applied. At the hearing, Charles Moorman testified that the purpose for his fence was to keep his neighbor's two children from

falling into his hot tub and to keep the Key Deer from eating his plants. He also testified that his fence was only about 400 feet long.

Despite the fact that this interim ordinance had been on the books for more than five years, this case was tried on an all-or-nothing basis upon the assumption that the Moormans' permit must either stand or fall without adjustment. By virtue of its authority to attach conditions and restrictions to its decision, the Cabinet had the power to fashion a remedy that would soften the blanket prohibition against fencing while at the same time honor environmental stewardship.

I would remand the case for another hearing directed toward whether the regulation was unconstitutional as applied to the Moormans or, alternatively, whether the permit should be modified.

WELLS, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Third District - Case No. 92-1785

David J. Russ, Assistant General Counsel and Brigette A. Ffolkes, Assistant General Counsel, Department of Community Affairs, Tallahassee, Florida,

for Petitioner

Theodore W. Herzog, Key West, Florida,

for Respondents

Richard Grosso, Tallahassee, Florida,

Amicus Curiae for 1000 Friends of Florida

(2)

95-2035

No. _____

Supreme Court, U.S.
FILED
APR 23 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES MOORMAN, KATHLEEN MOORMAN and YOUR LOCAL FENCE, INC.,

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12/1/96

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STATEMENT OF THE CASE

Respondent, State of Florida, Department of Community Affairs (DCA), agrees with Petitioners' statement of the case, except as follows.

The Court should disregard the references to the testimony of property owners, other than the Moormans, concerning the issuance of other permits because the Moormans' permit was the only one at issue in the Florida state courts. Also, Petitioners' description of the Florida supreme court's decision is inaccurate and misleading.

Petitioners claim that the Florida supreme court "failed and neglected to address or recognize the rights of Your Local Fence, Inc. as a business operation constructing fences throughout Big Pine

Key, Monroe County, Florida." (Petition at 18). However, Petitioners never argued the rights of Your Local Fence, Inc. before either the district court of appeal or the state supreme court. In any event, the "right" of Your Local Fence, Inc. to make money does not rise to the level of constitutional importance. Therefore, this portion of Petitioners' statement of the case should be disregarded.

Additionally, Petitioners claim that the Florida supreme court "neglected to address the question of [the] unconstitutional broad base and of the arbitrary and capricious nature of the subject land development regulation." (Petition at 21). However, this is exactly what the Florida supreme court

did address in passing on the facial constitutionality of the ordinance. The issue was simply not decided in Petitioners' favor.

Lastly, Petitioners' statement that the Florida supreme court's decision is directly contrary to the determinations of this Court (Petition at 21 - 23) is incorrect. The decision of the Florida supreme court is perfectly aligned with the rational nexus test established by this Court in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). More importantly, this Court's decision in Nollan, which was based, in part, on the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, is not relevant in

evaluating the Florida supreme court's decision in this case. Contrary to Petitioners' assertions, the Florida supreme court did not address and the Petitioners did not raise any federal constitutional claims. Also, the Florida supreme court's decision, which interprets provisions of the state constitution, is clearly not based on federal constitutional caselaw. Therefore, the whole Nollan discourse in Petitioners' statement of the case belies the fact that this Court would be improperly (for no special or important reason) expanding its discretionary jurisdiction on writs of certiorari, contrary to its established caselaw, were it to grant the petition in this case.

SUMMARY OF ARGUMENT

The Florida supreme court did not address and Petitioners did not raise any federal constitutional claims in this case. The Florida supreme court addressed only state constitutional law claims. Additionally, in passing on the state constitutional claims that were presented in this case, the Florida supreme court did not rely on any decisions of this Court. Consequently, Petitioners have failed to properly invoke the discretionary conflict jurisdiction of this Court, and the Petition for Writ of Certiorari should be denied.

ARGUMENT

THE CONFLICT JURISDICTION OF THIS COURT HAS NOT BEEN PROPERLY INVOKED BECAUSE THE FLORIDA SUPREME COURT'S DECISION DID NOT ADDRESS ANY FEDERAL QUESTIONS CONCERNING THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Contrary to Petitioners' assertions, the Florida supreme court did not address whether the Monroe County fence ordinance was unconstitutional under the federal constitution. Also, Petitioners raised no such claim in the Florida courts. In Department of Community Affairs v. Moorman, 664 So.2d 930 (Fla. 1995), the Florida supreme court was presented with and decided state constitutional due process claims. Consequently, Petitioners' stated reasons for invoking this Court's jurisdiction have no basis in law or fact, as more fully explained

below.

Petitioners claim that the discretionary conflict jurisdiction of this Court has been properly invoked under Supreme Court Rule 10.1(c) because the Florida supreme court, the state court of last resort, "has decided a Federal question in a way that conflicts with the applicable decisions of the United States Supreme Court." (Petition at 8). Specifically, Petitioners contend that the Florida supreme court's decision is in direct conflict with this Court's establishment of the rational nexus test in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987). The Nollan rational nexus test was based, in part, on the due process requirements of the

Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioners' contentions in this regard are blatantly incorrect. The Florida supreme court did not address and Petitioners did not raise any federal constitutional claims. In this case, the Florida supreme court squarely passed judgment on claimed due process violations under the state constitution. Therefore, under this Court's well-settled precedent, Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983), this Court should refuse to grant the petition for review. As this Court has repeatedly and wisely stated, "'[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'" Id. at 3476

(quoting Minnesota v. National Tea Co., 309 U.S. 551, 557, 60 S.Ct. 676, 679 (1940)).

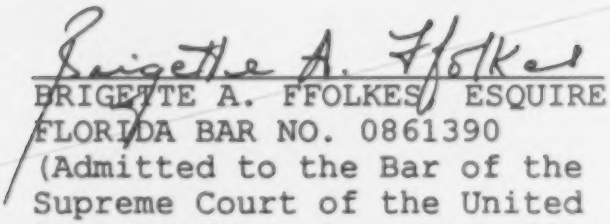
Additionally, in passing on the state constitutional claims that were presented in this case, the Florida supreme court relied exclusively on its own decisions. The Florida supreme court clearly did not rely on any of the decisions of this Court, including the Nollan decision, to construe state constitutional provisions. Therefore, there is no basis for saying that the Florida supreme court's decision in this case was grounded in federal caselaw.

CONCLUSION

Based on the foregoing argument, Respondent, State of Florida, Department of Community Affairs, respectfully

requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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